87-1785

No.

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IN THE

Supreme Court of the United States

October Term, 1987

Mayo Clinic, Dr. R. H. Fitzgerald,
Dr. J. K. Bradway, and Saint Marys Hospital,
Petitioners,

vs.

Marilyn and Russell Hughes,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Where state law provides that a newly enacted substantive statute is to apply to all actions "commenced" after the statute's effective date, is the "commencement" of a federal diversity action governed by Fed. R. Civ. P. 3 or by state law?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
A. Proceedings Before the District Court	3
B. Proceedings Before the Court of Appeals	4
Reasons for Granting the Writ	5
For Purposes Of Determining The Applicability Of State Substantive Statutes, The Commencement Of A Diversity Action Is Governed By State Law And Not By Fed. R. Civ. P. 3.	5
Conclusion	13

APPENDIX INDEX

APPENDIX A: Order of the district court, dated January 7, 1987 ..... A-1

APPENDIX B: Transcript of proceedings before the district court, dated January 7, 1987 . A-3

APPENDIX C: Opinion of the court of appeals, dated December 9, 1987 ..... A-18

APPENDIX D: Order of the court of appeals denying petition for rehearing, dated January 28, 1988 ..... A-26

APPENDIX E: Statutory provisions and rules A-27

TABLE OF AUTHORITIES

Cases:

Burlington Northern Railroad Co. v. Woods, ——U.S. ——,107 S.Ct. 967 (1987) 8
Daily Income Fund, Inc. v. Fox, 464 U.S. 523 (1984). 9
Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) ..6, 7, 8, 12
Hanna v. Plumer, 380 U.S. 460 (1965) 7, 8, 10
Hawes v. Oakland, 104 U.S. 450 (1881) 9
Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) 6, 11
Walker v. Armco Steel Corp., 446 U.S. 740 (1980) 5, 7, 8, 10, 11, 12
West v. Conrail, ——U.S.——, 107 S.Ct. 1538 (1987) 8

Statutes:

15 U.S.C. § 80a-1 9
28 U.S.C. § 1254(1) 2
28 U.S.C. § 2072 .....2, 8, 10
Minn. Stat. § 145.682 .....2, 3, 4, 5, 6, 8, 10, 11, 12
Minn. Stat. § 645.02 .....2, 4
1986 Minn. Laws ch. 455 4

Rules:

Fed. R. Civ. P. 3 .....5, 6, 7, 8, 9, 10, 11
Fed. R. Civ. P. 23.1 9
Minn. R. Civ. P. 3.01 .....2, 5

Other Authorities:

Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693 (1974) 10
Wright, Miller, and Cooper, *Federal Practice and Procedure* (1982) 9

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Mayo Clinic, Saint Marys Hospital, Dr. R. H. Fitzgerald and Dr. J. K. Bradway (collectively "Mayo")[1] respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on December 9, 1987.

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[1]Mayo Clinic is a division of Mayo Foundation; New England Pathology Services, Inc. is a non-wholly owned subsidiary of Mayo Foundation. Also named as defendants in this action were Dr. M. B. Hart, "Dr. Hernandez," "John Doe," and "ABC Corporation." Neither Dr. M. B. Hart nor "Dr. Hernandez" has been served; defendants "John Doe" and "ABC Corporation" remain unidentified.

OPINIONS BELOW

The order of the district court (App. A), dated January 7, 1987, is unreported. The opinion of the court of appeals (App. C) is reported at 834 F.2d 713 (8th Cir. 1987).

JURISDICTION

On December 9, 1987, the court of appeals entered an opinion (App. C) reversing the judgment of the district court and remanding the matter for further proceedings. Mayo filed a timely petition for rehearing on December 22, 1987. The petition for rehearing was denied on January 28, 1988 (App. D). This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Set forth in Appendix E are pertinent provisions of 28 U.S.C. § 2072, Minn. Stat. §§ 145.682 and 645.02, 1986 Minn. Laws ch. 455, Fed. R. Civ. P. 3 and Minn. R. Civ. P. 3.01.

STATEMENT OF THE CASE

This is a medical malpractice case in which the district court's jurisdiction was based on diversity of citizenship. The district court granted Mayo's motion for summary judgment and dismissed the complaint of plaintiff-respondents Marilyn and Russell Hughes under a Minnesota statute designed to bar frivolous malpractice actions.

The Court of Appeals for the Eighth Circuit reversed the judgment of the district court. The court of appeals held that for purposes of applying that Minnesota statute,

the "commencement" of this diversity case was governed by federal law rather than Minnesota law. The result of the court's decision is that this action, which would be dismissed in any Minnesota state court, has been permitted to continue solely because of the fortuity that the parties are of diverse citizenship.

A. Proceedings before the district court

Plaintiff-respondent Marilyn Hughes was a Mayo Clinic patient in 1984, at which time she underwent surgery for a total hip replacement. On July 8, 1986, the Hugheses filed a Complaint in the United States District Court for the District of Minnesota, alleging medical malpractice under Minnesota law. Their Complaint was not served on Mayo until August 1, 1986. When it was served, it was not accompanied by an Affidavit of Expert Review as required by Minn. Stat. § 145.682.[2]

---

[2]Pursuant to Minn. Stat. § 145.682, that Affidavit is a prerequisite to the commencement of a medical malpractice action in Minnesota. Section 145.682 was designed to discourage the bringing of frivolous medical malpractice actions and provides, in relevant part, as follows:

> Subd. 2. Requirement. In an action alleging malpractice, error, mistake, or failure to cure, whether based on contract or tort, against a health care provider which includes a cause of action as to which expert testimony is necessary to establish a prima facie case, the plaintiff must: (1) unless otherwise provided in subdivision 3, paragraph (b), serve upon defendant with the summons and complaint an affidavit as provided in subdivision 3; . . .
>
> * * *
>
> Subd. 3. Affidavit of expert review. The affidavit required by subdivision 2, clause (1), must be by the plaintiff's attorney and state that:
>
> (a) the facts of the case have been reviewed by the plaintiff's attorney with an expert whose qualifications provide a reasonable expectation that the expert's opinions could be admissible at trial and that, in the opinion of this expert, one or more defendants deviated from the applicable standard of care and by that action caused injury to the plaintiff; . . .
>
> * * *
>
> Subd. 6. Penalty for noncompliance. Failure to comply with subdivision 2, clause (1), within 60 days after demand for the affidavit results, upon motion, in mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a prima facie case.

Mayo served a Joint Answer on August 21, 1986, denying all allegations of malpractice. Also on August 21, 1986, Mayo served on the Hugheses' counsel a demand for the Affidavit of Expert Review. The sixty days allowed for the Hugheses to provide the required Affidavit passed without reply, so, on October 27, 1986, Mayo moved for the summary judgment mandated by Minnesota's statute.

Mayo's motion was granted by the district court on January 7, 1987. (App. A). The Hugheses still had not supplied an Affidavit of Expert Review by the time of the hearing. Hugheses' counsel told the district court that he had approached several potential experts, but none believed that the Mayo doctors had committed malpractice. (App. B, p. A-14).

B. Proceedings before the court of appeals

The court of appeals reversed the district court's order, solely on the ground that the plaintiffs' action was commenced prior to the effective date of Minn. Stat. § 145.682.[3] (App. C). The court of appeals held that for purposes of applying this Minnesota statute, plaintiffs' action was commenced upon their *filing* of their Complaint on July 8, 1986, not upon their *service* of the Complaint on August 1, 1986. The court of appeals issued an order on January 28, 1988 denying Mayo's petition for rehearing *en banc*, with Judges Fagg, Bowman, and Magill voting to grant the petition. (App. D).

---

[3]The statute of which Minn. Stat. § 145.682 is a part was enacted on March 25, 1986. 1986 Minn. Laws, S.F. No. 2078, Ch. 455. It provided that § 60 thereof, now codified as Minn. Stat. § 145.682, was to "apply to all actions commenced on or after (its) effective date." *Id.* at § 95. Minn. Stat. § 645.02 provides that each act of the legislature takes effect at 12:01 a.m. on August 1 following its enactment, unless a different date or time is specified in the act. No different date or time was specified, so the new law took effect on August 1, 1986. Accordingly, Minn. Stat. § 145.682 applies to any action "commenced" on or after August 1, 1986.

REASONS FOR GRANTING THE WRIT

For Purposes Of Determining The Applicability Of State Substantive Statutes, The Commencement Of A Diversity Action Is Governed By State Law and Not By Fed R. Civ. P. 3.

In *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), this Court held that the "commencement" of a diversity action, for the purposes of tolling state statutes of limitations, is governed by state law rather than Fed. R. Civ. P. 3.[4] This case presents an important issue not specifically decided in *Walker*: whether Fed. R. Civ. P. 3 or state law governs the "commencement" of a diversity action in determining the applicability of other substantive state statutes.

The plaintiffs in this case served their Complaint after Minn. Stat. § 145.682 took effect, yet failed to provide the Affidavit of Expert Review required by the statute. As a result, their Complaint would undisputedly have been subject to mandatory dismissal had it been brought in a Minnesota state court. Unlike its counterpart in the Federal Rules of Civil Procedure, Minn. R. Civ. P. 3.01 provides that "[a] civil action is commenced against each defendant: (a) when the summons is *served* upon that defendant . . ." (emphasis added). Accordingly, this action was "commenced" under Minnesota law after Minn. Stat. § 145.682 took effect.[5]

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[4]Fed. R. Civ. P. 3 provides that "[a] civil action is commenced by filing a complaint with the court."

[5]Minn. Stat. § 145.682 also uses the terms "service" and "commencement" interchangeably. For example, § 145.682, Subd. 3(b) provides to a plaintiff's lawyer temporary relief from the requirement that an Affidavit of Expert Review be served with the summons and complaint, if he certifies that he could not obtain an expert review "before the action was commenced because of the applicable statute of limitations." In that event, the plaintiff's lawyer must provide the required Affidavit "within 90 days after service of the summons and complaint." In order to "commence" the action and toll the statute of limitations, of course, the plaintiff's lawyer must serve a summons and complaint. Minn. Stat.

The application of Minn. Stat. § 145.682 should not differ merely because the plaintiffs sued Mayo in federal court. It is now well settled that the commencement of a diversity action, for the purposes of tolling state statutes of limitations, is governed by state law rather than Fed. R. Civ. P. 3. This Court first decided the issue in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949). The plaintiff in *Ragan* had filed his complaint in the district court but had not served it on the defendant until nearly four months later. In the interim, Kansas' two-year statute of limitations had run. This Court held that filing of the complaint did not "commence" the action and toll the statute of limitations, because Kansas law required the service of a summons to commence an action. The Court explained:

> [I]n the present case we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court. . . . It accrues and comes to an end when local law so declares. . . . Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co. v. Tompkins* is transgressed.
>
> * * *

§ 145.682 obviously equates "commencement" and "service" for purposes of the statute in the same manner. Thus, in declaring that Minn. Stat. § 145.682 applied to all actions "commenced" on or after its effective date, the Minnesota legislature obviously contemplated that the statute would apply to all actions in which a summons and complaint were served on or after that date.

> We cannot give it longer life in the federal court than it would have had in the state court without adding something to the cause of action. We may not do that consistently with *Erie R. Co. v. Tompkins.*

337 U.S. at 533-4 (citations omitted). Accordingly, this Court affirmed the dismissal of the plaintiff's action.

The issue again reached this Court in the statute of limitations context in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). In *Walker*, this Court again held that the "commencement" of a diversity action is governed by state law, not by Fed. R. Civ. P. 3. This Court observed that Rule 3 was never intended to toll state statutes of limitations, and that its primary purpose is the measuring of the various time periods in the Federal Rules that run from the date of commencement. Having found no direct conflict between Fed. R. Civ. P. 3 and the applicable Oklahoma law, this Court held that the application of state law was required by the "twin aims" of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938): "discouragement of forum-shopping and avoidance of inequitable administration of the laws." 446 U.S. at 747. With regard to those "twin aims," this Court observed:

> It is sufficient to note that although in this case failure to apply the state service law might not create any problem of forum shopping, the result would be an "inequitable administration" of the law. *Hanna v. Plumer*, 380 U.S., at 468. There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity

> that there is diversity of citizenship between the litigants. The policies underlying diversity jurisdiction do not support such distinction between state and federal plaintiffs, and *Erie* and its progeny do not permit it.

446 U.S. at 753 (footnote omitted). *Accord, West v. Conrail,* — U.S. —, 107 S.Ct. 1538, 1541 n. 4 (1987).

The issue presented in this case is whether the commencement of this diversity action, for purposes of determining the application of a substantive state statute (Minn. Stat. § 145.682), is similarly governed by state law rather than Fed. R. Civ. P. 3.

Under *Walker,* that issue is to be resolved under the principles of *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), unless there is a Federal Rule "sufficiently broad to control the issue before the Court." *Walker,* 446 U.S. at 749-50; *Burlington Northern Railroad Co. v. Woods,* — U.S. —, 107 S.Ct. 967 (1987). Even if there is a "sufficiently broad" Federal Rule, application of the Rule must be consistent with the limits of the Rules Enabling Act, 28 U.S.C. § 2072[6], and the Constitution. *Hanna v. Plumer,* 380 U.S. 460 (1965).

The scope of Fed. R. Civ. P. 3 is not sufficiently broad to govern the application of Minn. Stat. § 145.682. In *Walker, supra,* this Court observed that "in diversity actions Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run . . . ." 446 U.S. at

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[6]The Rules Enabling Act provides, in pertinent part, as follows:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions. . .
>
> Such rules shall not abridge, enlarge or modify any substantive right. . .

751. This Court has never suggested that Rule 3 has any other function in diversity cases. Moreover, Justices of this Court have counselled against interpreting the Federal Rules expansively in doubtful cases, if doing so would have any substantive effect.

In *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523 (1984), for example, this Court held that Fed. R. Civ. P. 23.1 does not create a "demand requirement" in actions brought under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.* Concurring in the judgment, Justice Stevens noted that the "demand requirement" in shareholders' derivative actions was created not by Rule 23.1, but by *Hawes v. Oakland*, 104 U.S. 450 (1881). Justice Stevens acknowledged "substantial doubt whether the Rule could create such a requirement consistently with the Rules Enabling Act .... Since the Rule does not clearly create such a substantive requirement by its express terms, it should not be lightly construed to do so and thereby alter substantive rights." 464 U.S. at 544, n. 2 (citations omitted). *See also* Wright, Miller, and Cooper, *Federal Practice and Procedure*, § 4510 at 168 (1982) ("if there is some uncertainty about the intended scope of the Rule, and if the broader construction would interfere with state substantive policies, the concern for state substantive policies reflected in the 'substantive rights' proviso of the Enabling Act counsels for resolving the uncertainty in favor of the more narrow construction."). There is consequently neither authority for nor logic to the Eighth Circuit's holding that the scope of Fed. R. Civ. P. 3 is broad enough to govern the "commencement" of this case.

Even if the scope of Rule 3 *were* sufficiently broad, its application to this case would contravene the Rules Enabl-

ing Act. The Enabling Act requires that the Federal Rules not "abridge, enlarge, or modify any substantive right. . . ." 28 U.S.C. § 2072. A substantive right is a right "granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process." *See* Ely, *The Irrepressible Myth of Erie,* 87 Harv. L. Rev. 693, 725 (1974).

The rights granted to would-be malpractice defendants under Minn. Stat. § 145.682 surely extend beyond the "fairness or efficiency of the litigation process." The statute was a part of a tort reform act enacted by the Minnesota legislature in 1986, and it was designed to inhibit the bringing of frivolous medical malpractice cases. The Minnesota legislature reasonably concluded that if a malpractice claim were even marginally meritorious, it would not impose an undue burden to require the plaintiff's lawyer to locate one expert witness who would support the claim. The statute thus imposes a significant new substantive requirement in Minnesota malpractice law; under the Rules Enabling Act, Fed. R. Civ. P. 3 cannot properly be applied to abridge that right. *See Hanna, supra,* 380 U.S. at 471.

Because the scope of Fed. R. Civ. P. 3 is not and could not be broad enough to govern "commencement" of this case, the application of state law is required by the "twin aims" of *Erie, supra:* "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Walker, supra,* 446 U.S. at 747. The court of appeals found no forum shopping in this case. This observation was unfounded, albeit unimportant. The court of appeals noted that the plaintiffs could have brought this action in state court, and could have served a state court summons and complaint before Minn. Stat. § 145.682 took effect on

August 1, 1986. (App. C, p. A-24). The plaintiffs no doubt also could have served their federal court complaint before August 1, 1986; they did not do so, and their choice of forum is the sole reason that their lawsuit has been permitted to proceed. In any event, this Court noted in *Walker* that the presence or absence of forum shopping was not of great significance. 446 U.S. at 753.

More importantly, the court of appeals' decision has resulted in manifestly inequitable administration of the law. This action would now be dismissed, pursuant to Minn. Stat. § 145.682, had it been brought in any Minnesota state court. It has been permitted to proceed in federal court for precisely the reason — "the fortuity that there is diversity" — that this Court forbade in *Walker*. 446 U.S. at 753. The court of appeals attempted to minimize this inequity by stating that Minn. Stat. § 145.682 does not "vitally" affect any state-created right, and affects this litigation only "formally or negligibly." (App. C, p. A-25). On the contrary, Minn. Stat. § 145.682 is an absolute and mandatory bar to the bringing of any malpractice action that is not supported by an expert witness at its outset. It has a "vital" — or "fatal" — effect on every medical malpractice lawsuit in Minnesota. By applying Fed. R. Civ. P. 3, the court of appeals has given this action an earlier birth and, hence, a "longer life in the federal court than it would have had in the state court", in contravention of this Court's holding in *Ragan*. 337 U.S. at 533-4.

Minn. Stat. § 145.682 serves a substantive purpose at least as important as that served by statutes of limitations. Statutes of limitations are designed to bar stale claims; section 145.682 is designed to bar frivolous malpractice claims that no expert will support. The court of appeals noted that

Mayo may still seek summary judgment or a directed verdict. It is equally true, of course, that the defendant in any suit barred by the statute of limitations may ultimately prevail on the merits of the claim asserted. This prospect of ultimate success, however, does not somehow deprive defendants of their right to summary dismissal under the statute of limitations or, in this instance, under Minnesota's tort reform statute.

This action was "commenced", as provided by Minnesota law, when plaintiffs served their Complaint. Since they served their Complaint after Minn. Stat. § 145.682 took effect, they were bound by its requirements. They did not meet those requirements, and the district court correctly dismissed the action.

The anomalous result of the court of appeals' decision is that the filing of a Complaint *did* commence this action for purposes of one state law (Minn. Stat. § 145.682), even though it did *not* commence the action for purposes of another state law (the statute of limitations). Moreover, the inequity caused by the court of appeals' decision will reappear each time a state legislature enacts a new statute having any impact on civil litigation. According to the court of appeals, the real effective date of each new statute will now vary, depending on whether a plaintiff sues in federal or state court. This "inequitable administration" is plainly inconsistent with *Erie* and *Walker*. Mayo respectfully submits that this Court's review is warranted and is necessary to prevent that "inequitable administration" in this and other cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
Civ. File No. 3-86-614

Marilyn and Russell Hughes,

Plaintiffs,

vs.

Mayo Clinic, Dr. R. H. Fitzgerald, Dr. M. B. Hart, Dr. J. K. Bradway, Dr. Hernandez, St. Marys Hospital, John Doe and ABC Corporation,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT

This matter came before the Court on the motion of defendants for summary judgment. Gary K. Wood, Esq. appeared on behalf of plaintiffs; Paul B. Klaas, Esq. appeared on behalf of defendants.

The Court having considered all of the files, records, and proceedings herein, including the material submitted by the parties in connection with this motion and oral argument at the hearing, and the Court being duly advised in the premises and finding that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law,

IT IS HEREBY ORDERED that defendants' motion is GRANTED; and the Clerk of Court shall enter judgment for defendants and against the plaintiffs, dismissing this

action against defendants with prejudice and awarding defendants their costs and disbursements incurred therein.

LET JUDGMENT BE ENTERED ACCORDINGLY.
Dated: January 7, 1987.

/s/Robert G. Renner
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Marilyn and Russell Hughes,

Plaintiffs,

vs.

Mayo Clinic, et al.,

Defendants.

3-86 Civ 614

Transcript of proceedings had in the above-entitled matter before the Honorable Robert G. Renner, U.S. District Court, United States Courthouse, St. Paul, Minnesota, January 7, 1987.

APPEARANCES:

On behalf of the Plaintiffs:

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On behalf of the Defendants:

Dorsey & Whitney, 2200 First Bank Place East; Minneapolis, Minnesota 55402; by Paul B. Klaas, Esq.; and Ann E. Decker, Esq., In-house Counsel, Mayo Clinic; Rochester, Minnesota 55901

* * *

Robert W. Riley
Official Court Reporter
748 US Courthouse
St. Paul, Minnesota 55101

January 7, 1987

THE COURT: The first matter is Marilyn and Russell Hughes versus Mayo Clinic, et al. We have defendants' motion for summary judgment based on the plaintiffs' failure to supply an affidavit of expert review as required by state law. May we have appearances?

MR. KLAAS: Good morning, Your Honor. My name is Paul Klaas. I'm from the Dorsey firm in Minneapolis. With me is Ann Decker, legal counsel of the Mayo Clinic up here from Rochester representing defendants.

MR. WOOD: Gary Wood appearing on behalf of Marilyn and Russell Hughes.

THE COURT: I am going to read into the record the facts as I view them. And I would appreciate if you would listen with some intensity to allow me the benefit of your advice concerning any errors of inadvertence that I might make.

Plaintiffs Marilyn and Russell Hughes commenced this diversity action alleging medical malpractice by filing a complaint on July 8, 1986. Service was made personally on defendants on August 1, 1986. On August 21, 1986, the defendants answered and also served the demand upon plaintiffs for an affidavit of expert reviews pursuant to 1986 Minnesota laws, Chapter 455, Section 60. Plaintiff failed to supply the required affidavits within the 60 days after demand that the statute requires. And according to the defendant, the statute now mandates that plaintiffs' complaint be dismissed with prejudice.

Plaintiffs contend that the statute is inapplicable to their action, because, one, the effective date of the statute was after the date of the filing of their complaint, and/or, two, no expert review was required because the defendants' departure from the appropriate standard of care and causation are issues within the common knowledge of laymen solely on what can be seen in the X rays.

It is true that the relevant sections of the Minnesota law, Chapter 455, Section 60, now codified as MSA 145.-682, do provide — and I won't read the statute, but that section does provide that an action alleging malpractice, error, mistake or failure to cure, whether based on contract or tort, against a health care provider, which includes a cause of action as to which expert testimony would be necessary, requires the plaintiffs' attorney to file an affidavit in which he would state that he has reviewed the case with an expert and whose classifications provide a reasonable expectation that the expert opinions could be admissible at trial, and to the effect that the expert's opinion would hold that one or more of the defendants deviated from the applicable standard of care and thereby would occasion damage or injury, and that failure to provide such an affidavit within 60 days mandates dismissal.

The statute applies to all actions commenced on or after its effective date. Unfortunately, there was no effective date specified; therefore, under ruling case law, the effective date would be August 1st, 1986. Under Federal Rules of Civil Procedure, Rule 3, a civil action is commenced by filing a complaint with the court. Since this action was commenced on July 8, 1986, prior to the effective date of the statute, if the federal procedure rule applies, plaintiffs are not bound by the requirements of MSA 145.682.

In contrast to the federal rule, however, under Minnesota statute, a civil action is commenced when a summons is served upon the defendant, Rule 3.01. Under the state commencement rule, this action was commenced on August 1, 1986, the same day that MSA 145.682 became effective. Thus, this motion today which we're going to hear turns on whether the federal or the state rule for commencement of action should control.

Have I stated the situation as it presently exists?

MR. WOOD: Very accurately for the plaintiff, Your Honor.

MR. KLAAS: Your Honor, may I speak for the motion now?

THE COURT: Yes. Do you agree that I have stated it as it exists?

MR. KLAAS: I disagree with Your Honor's first sentence and agree with the rest.

THE COURT: In what regard?

MR. KLAAS: I believe the first sentence was that this action was commenced by filing on July 8, 1986. As Your Honor summarizes correctly at the end, the issue is was it commenced by filing, or was it commenced by service. And that becomes the operative word, and Your Honor is precisely accurate, I think, in summarizing the pertinent legal issue that's before the Court. It is, of course, not the first time that that particular issue has been before this Court, before the Eighth Circuit or before the United States Supreme Court.

THE COURT: Before you go, I am forced — while the calendar shows three matters, it is followed by a preliminary injunction hearing, of which considerable time must be taken and sentencings, so the Court is going to be busy all

morning. It is going to necessitate limiting the time. So I must tell you that I will give you ten minutes.

MR. KLAAS: That's fine, Your Honor. That should be more than adequate.

As I say, Your Honor, the issue has been up before Your Honor's colleagues on this bench, specifically Judge Devitt, Magnuson and MacLaughlin, before the United States Supreme Court in 1980 in Walker versus Armco Steel, before the Eighth Circuit Court of Appeals in Fisher versus Iowa Mold Tooling, precisely this issue. That is, in a diversity case, which is what this is, in which claims are alleged based entirely on state law, which is what this is, does the state rule regarding commencement of the action under state statutes and state law control, or does Federal Rule 3 control. The answer in all occasions has been that state law controls.

In this instance, Minnesota Rules of Civil Procedure, 3.01, which say that an action is not commenced in this state until service — service, of course, occurred on August 1st, the effective date of the statute — the statutory provisions apply and require dismissal, if I am right. And I claim, of course, company from Judges Devitt, Magnuson, MacLaughlin, the United States Supreme Court and the Eighth Circuit.

That leaves, I suppose, one interesting question, what is Federal Rule 3 for then. Federal Rule 3, according to Walker versus Armco Steel, page 571, says in diversity actions, Rule 3 governs the date from which various timing requirements of the federal rules begin to run. And, of course, in federal question litigation, Federal Rule 3 has tremendous breadth and vitality. But that is not the point of Rule 3 — that is, to determine the effective dates of

requirements of Minnesota state statutes enacted after considerable lobbying and craftsmanship by the Minnesota state legislature to protect Minnesota doctors from frivolous malpractice actions. Timely service under Rule 3 requires that the matter not be commenced until personal service, and of course, that occurred on August 1st.

Now, it is true that all the cases that I have argued before Your Honor's colleagues that were brought up to the United States Supreme Court and the Eighth Circuit where the state statute was involved was a statute of limitation, not a Tort Reform Act. It requires some fairly remarkable coincidenees for this particular issue to arise. It does not require any particular coincidences for state statutes of limitation to present a procedural problem that would raise the state law, federal law controlling issue.

That we suggest in our response papers — which I think I have already apologized to the Court for submitting yesterday, was one day after we got our first opposition to this motion. The Tort Reform Act that we're relying on actually quotes the Minnesota state statute of limitations in defining its applicability. That is, it's applicable to actions alleging malpractice, error or failure to care, whether based on contract or tort. Both statutes impose requirements on commencing state law actions for malpractice. In a statute of limitations case, you have to commence within two years. In the case of the Tort Reform Act, you have to commence with an affidavit of expert review.

Both use advisedly the word "commence." And in the case actually of the Tort Reform Act, it's a little more apparent what the legislature had in mind, because Subdivision 2, which we quote in our brief to Your Honor, actually sets forth the operative event. That is. you've got to serve this

affidavit of expert review with your summons and complaint, a requirement which is not in the statute of limitations. So they have the same function — that is, eliminating bad malpractice claims. And whether the legitimate goal of the Minnesota legislature is to eliminate them because they're stale or frivolous, they certainly are both legitimate goals and should be enforced by this Court, sitting as it does in this instance, in diversity.

THE COURT: Let me ask you this. It's obvious what this legislature intended, but in case law, in practice in the state courts in medical malpractice actions, a plaintiff was not before required to prove his case up by using his own expert, but to do so by using the defendant's expert. What is this going to do to that practice, assuming that we go along with your argument?

MR KLAAS: It seems to me there are two things that plaintiffs can do under the Tort Reform Act. I guess I have always taken the view that, among other things, Federal Rule 11 requires plaintiff's lawyers to consult with experts before alleging malpractice, because lawyers don't know what the standards are or what the departures are. There may already be a requirement under just how lawyers —

THE COURT: Are you saying there would have to be sanctions if they failed to do that?

MR. KLAAS: I suspect there might be.

THE COURT: What if they have a good case, regardless of whether they've consulted?

MR. KLAAS: The problem is that in these cases experts determine what's a good case. I'm just a lawyer. I don't know what the applicable medical standards are.

THE COURT: After you try a case or two, you have an idea of what you've got.

MR. KLAAS: You are exactly right, Your Honor. That's not this case. Admittedly, that's true.

Secondly, Your Honor, the requirement of the Tort Reform Act is that you serve with the summons and complaint your affidavit of expert review. There is no sanction for failing to do that until 60 days after demand.

Now, I think Your Honor raises a nice question. If within that 60 days the plaintiff goes off, deposes all the defendants and gets all kinds of admissions that they committed malpractice on a grand scale, whether they can then submit an affidavit, beat the sanctions by saying, "I've got experts to testify to it, they happen to be defendants," presumably, that could happen. It didn't happen in this case. And I assure Your Honor that it's never going to happen that the defendant doctors in this instance or going to or ever would admit to any malpractice, because it's already been denied.

But I think it's an interesting question as to whether the requirements of the Tort Reform Act can be complied with by taking a deposition of a doctor within the 60 days that you are granted to cure the problem that you originally created by not complying with the Tort Reform Act up front.

Really what this case is about and what Walker was about and what Fisher was about and all the other cases is is this Court sitting in diversity going to behave as Erie and all its progeny require as a state court in the State of Minnesota, or is there going to be, because Mrs. Hughes happens to be from Indiana rather than from Minnesota, inequitable administration of the law, which is, of course, from Erie, from Guarantee Trust, from Hanna, from Ragan and finally from Walker. It is the bottom of the Walker versus Armco Steel opinion. There isn't concern in there

about forum shopping or anything else. What there is is concern that people from out of state be treated as well, but no better, than people in the state when they're pursuing diversity litigation in federal court.

Let me respond very briefly, Your Honor, to the issue raised by the plaintiffs that — and it is true that the Tort Reform Act requires affidavits of expert review only as to those claims for which experts are required. Plaintiffs have kindly supplied us all with X rays and suggested we read them and find malpractice in them. That is a suggestion, I think, that is rejected widely by all courts and not very plausible. Medical practice litigation, as all the cases cited by all the parties in this case, requires expert testimony, particularly on liability and causation issues. Whatever the claim may be, liability and causation are matters of experts. Malpractice litigation is frequently referred to as the battle of the experts. And I refer Your Honor specially to the Smith versus Knowles case, which is cited for some reason by the plaintiff, which just says that, you need experts to establish prima facie validity for malpractice claims.

I can't read X rays. Perhaps Your Honor can, but I doubt very seriously that the jury can to establish malpractice.

THE COURT: I really can't believe the plaintiff is terribly serious about that argument.

MR. KLAAS: I hope not, Your Honor. But if it's made, it has to be responded to, I suppose.

We think, Your Honor, that the state statute, the Tort Reform Act, quite clearly applied, because this is diversity, not federal question litigation. The statute was effective on the date of service. And once that's established, all the rest flows extremely naturally and is essentially undenied by the

plaintiff. The punch line then is mandatory dismissal. It's not a matter that's left to the discretion of the courts by the legislature if they had to comply, and we think they did. They did not — that's admitted — and the sanction is mandatory dismissal.

In some of the cases in which I have appeared before Your Honor's colleagues on the bench of this court arguing that the statute of limitations applied, I occasionally felt a little sheepish, because I had to stand up and admit that maybe this is a meritorious case, but they simply didn't comply with the state statute. Fortunately, I don't have to feel sheepish this morning, because what this is trying to do is take out frivolous cases.

This motion could have been short-circuited last fall by somebody just sending me an affidavit saying yes, I talked to an expert and somebody thinks that something went wrong here. That didn't happen, and I suggest to Your Honor there's a very good reason for that not to have happened.

THE COURT: What's the status with regard to the statute of limitations? What if I grant your motion? What precludes them from starting another action?

MR. KLAAS: The statute passed.

THE COURT: All right. Mr. Wood. Are you serious about your X-ray argument?

MR. WOOD: Not entirely, but not entirely unserious, Your Honor. I think what it points out is that, just as the Court said before, there are cases in which this law was never intended to apply. When there is a sponge or a pair of scissors locked inside somebody, you can look at an X ray and you can see that.

THE COURT: What you are really saying, though, is

that the statute has to be complied with, and that if it's so clearly an error of judgment or whatever as demonstrated by a broken bone showing up on an X ray, then maybe you don't have to comply with the statute. But this isn't that kind of a case.

MR. WOOD: Well, Your Honor, I think it's very, very close. As you look at those X rays, you will see that the femoral component of this total hip replacement is almost completely outside the acetabular component in that X ray.

THE COURT: Are you saying that a layman could come in and explain to the satisfaction of a Court and jury what that involves, what caused it?

MR. WOOD: Three days after the surgery occurred, Mr. Hughes looked at that X ray and said, "Gee, that doesn't look right." Anybody can look at that and say that doesn't look right. There's something wrong with it.

Unfortunately, what the Minnesota statute does is it takes away from any plaintiff, and essentially from a jury, the right to really consider the close cases that experts, because of their other professional organizations and associations, may not be willing to come into court to become a part of and say that in fact no, a jury can't decide whether or not Mrs. Hughes was wronged, but in fact we have to ask a doctor, who will then not only be the medical practitioner but the judge and jury as well.

THE COURT: You are arguing against the statute, but the statute is here and upon us.

MR. WOOD: The statute is here, and you are right, there is an incredible set of facts here that even brings us before the Court. In fact, I would assume Mr. Klaas' position would be that if 24 hours earlier this complaint had been served on his defendant doctors, his entire position would be nonexistent, because in fact that part of the statute was not

effective. No expert review was required on July 31st, only on August 1st.

Your Honor, all of the cases that he has mentioned do specifically refer to a state statute of limitations. And the Walker case and all those do specifically say that a person from another state shouldn't be able to come in and bring a lawsuit where they're completely barred for it. That isn't the case here. What we're talking about is a procedural issue.

THE COURT: Why wasn't an affidavit furnished?

MR. WOOD: It's a very close question, Your Honor. Quite frankly, we have talked to several doctors, and they all say, "Gee, this is very, very close."

THE COURT: Isn't that the reason for the statute, though?

MR. WOOD: That's right, Your Honor. But nobody should be deprived because of their inability to locate somebody because of a limitation of economic resources from being given the opportunity to present —

THE COURT: You are arguing the statute again.

MR. WOOD: You are right, Your Honor, I am. The statute is wrong. It's morally and ethically wrong.

THE COURT: I can't do anything about that.

MR. WOOD: I understand that. But, Your Honor, in this case you can. In this case you can, because those cases, the federal cases saying that this case should be barred because it was not commenced don't prohibit her from having her claim. It's a matter of whether she will have a form to have this case heard other than the medical quality foundation or the other corporations that have been formed in the United States to review cases, either pro or against medical malpractice actions.

Here what we're talking about is a state-created procedure to make a preliminary determination of the essential

issues of the claim, whether a tort was committed. The only case that I have been able to locate thus far is Hibbs versus Yosher, which is a case in Rhode Island where the state statute said you have to take a case before a state judge and let him give a preliminary opinion, almost like a probable cause hearing in a criminal case, before you can proceed.

In that case, the federal court said, nuts, we don't have to follow the procedural rules of the state that interfere with the operation of justice in the federal courts. And that's all we're asking for here — that the state rule, which says that an expert's affidavit has to be filed in order to continue this action, is not applicable here, because it wasn't in effect at the time that this case was filed in federal court.

THE COURT: But in your case to which you refer, that was a state statute which required in essence a federal District Court judge to screen evidence and to issue findings of fact as to whether the evidence presented if properly substantiated and viewed in the light most favorable to the plaintiff would be sufficient to raise a legitimate question of liability. And the Court held a state legislature did not have this authority to interfere with federal judge and jury relationship. And that's a different situation than you have here.

MR. WOOD: It's not, because, Your Honor, what we're asking you to do is for you first — I may have another motion for summary judgment — to look at the evidence, all of the evidence that can be presented, whether it's the testimony of the doctors themselves or an expert or the X rays or whatever can be offered to this Court to determine whether or not there is sufficient evidence on the merits to allow this case to go to a jury. That isn't even before the Court.

THE COURT: I'd love to do it. But I am going to rule against you. I am going to put on the record my reasons, and you can take it up on appeal and maybe — because I sympathize with your client, and the equities would seem to be in your favor. But it does seem to me that the law is against you. I'm going to state for the record my reasons right now.

MR. WOOD: Thank you, Your Honor.

THE COURT: As a general rule, when a federal procedural rule is directly in conflict with a state procedural rule, the federal rule controls, Hanna versus Plummer, 380 US 460, 1965 case. There are, however, limitations. For example, the federal rules cannot be used to toll a state statute of limitations, as we have heard. And that's Fisher versus Iowa Mold Tooling Company, an Eighth Circuit 1982, 690 F.2d 155, and the Walker versus Armco Steel, 446 US 740, a 1980 Supreme Court case.

Now, the rationale of these statute of limitations cases is the avoidance of inequitable administration of law whereby an action based on state law which concededly would be barred in the state courts would not be barred in the federal court, solely because of the fortuity that there is diversity of citizenship between the litigants. The Court has found no cases applying the Walker or Fisher analysis outside of the statute of limitations context.

The defendant argues in favor of extending their applicability into the present novel context. First, the defendant notes that the state statute of limitation at issue in Walker and Fisher were designed to bar stale claims. The state statute at issue in this litigation is designated to bar frivolous malpractice claims that no expert will support. Second, if the state commencement rule is not applied, an action which would surely be dismissed by a Minnesota state court would

proceed precisely because of the fortuity of the diversity of citizenship between the litigants. This is clearly in opposition to what Walker and Fisher require.

Plaintiff's second argument against application of the statute, as I have mentioned, is not convincing. I just can't believe that in the facts of this case that there would be issues which would be within the common knowledge of laymen, solely based on what it would seem in the X rays. To allow that under the facts of this case would be to in effect disregard completely the statute.

It is well established that the prima facie case for medical malpractice cannot be established without expert testimony on such critical issues as standard of care, doctor's departure from that standard and causation. While several Minnesota state courts' decisions establish that a plaintiff may prove his malpractice claim by expert testimony elicited solely from the defendant doctors, these decisions do not alleviate the requirement for expert testimony.

Although Mr. Klaas has mentioned the situation relating to taking a deposition of a defendant's doctor could well be interpreted to be sufficient, I don't have to rule on that at this time. It's a moot question for this Court, but it's a question, I'm sure, that other courts will in time be running into.

But under the circumstances, I see no other alternative, although I realize plaintiffs' plight. But under the law as I read it, I see no other alternative than to grant the motion of the defense, and I will so grant.

Do I have an order in this matter?

MR. KLAAS: We submitted kind of a short form proposed order.

THE COURT: Very well, that will be all.

CERTIFIED: Robert W. Ziley

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5057

Marilyn Hughes and Russell Hughes,

Appellants,

vs.

Mayo Clinic, Dr. R. H. Fitzgerald, Dr. M. B. Hart, Dr. J. K. Bradway, Dr. Hernandez, St. Mary's Hospital, John Doe and ABC Corporation,

Appellees.

St. Mary's Hospital,

vs.

Marilyn & Russell Hughes.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA

Submitted: September 3, 1987
Filed: December 9, 1987

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and MAGILL, Circuit Judge.

LAY, Chief Judge.

This is a medical malpractice action in which jurisdiction is based on diversity of citizenship. 28 U.S.C. § 1332 (1982). Marilyn Hughes and her husband, Russell, citizens of Illinois, are suing the Mayo Clinic, Inc., et al. ("Mayo Clinic").[1] Mrs. Hughes' suit arises from a surgical procedure resulting in total hip arthroplasty on July 12, 1984. On July 8, 1986 suit was filed in the United States District Court, District of Minnesota. Mayo Clinic and the several defendant doctors, however, were not served with copies of the summons and complaint until late afternoon on August 1, 1986. At 12:01 a.m. on August 1, Minn. Stat. Ann. § 145.682 (West Supp. 1987) became effective, and that statute requires all plaintiffs filing medical malpractice claims in Minnesota to submit an affidavit by plaintiff's counsel verifying that an expert has reviewed the facts and is of the opinion that the defendants have deviated from the applicable standard of medical care. Minn. Stat. Ann. § 145.682(3)(a). It is conceded that the Hugheses did not submit such an affidavit. The fundamental issue is whether the Minnesota statute applies to a malpractice action filed in federal court prior to August 1, 1986.

The defendants filed an answer and simultaneously served a demand for an affidavit of expert review pursuant to Minn. Stat. Ann § 145.682. Because the Hugheses could not locate an expert who would state that the defendants had deviated from the applicable standard of medical care, Mayo Clinic moved for summary judgment. In response to the Mayo Clinic's motion, the Hugheses urged that the action was commenced on July 8, 1986, before the Minne-

[1]Mayo Clinic of Rochester, Minnesota, Dr. R. H. Fitzgerald, Dr. M. B. Hart, Dr. J. K. Bradway, Dr. Hernandez, St. Mary's Hospital, John Doe, and ABC Corporation.

sota statute became effective, and, alternatively that the malpractice was so obvious, as demonstrated by the X ray, that no expert opinion was required under Minn. Stat. Ann. § 145.682. The Hugheses base their argument on the express language of rule 3 of the Federal Rules of Civil Procedure, which states that an action is "commenced" when the complaint is filed with the court.[2]

The district court, the Honorable Robert G. Renner, held that Minn. Stat. Ann. § 145.682 applied because the suit was not commenced under Minnesota law until the summons was served on the defendant. Minn. R. Civ. P. 3.01 (Supp. 1987).[3] On this basis, the court granted the Mayo Clinic and other defendants summary judgment. Judge Renner also dismissed the Hughes' claim that the malpractice was so obvious as to obviate the need for expert review.[4] We reverse and remand the cause for further proceedings in the district court.

The district court reasoned that under *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), state law, rather than Fed. R. Civ. P. 3, governs the date of commencement. Since this court construes *Walker* differently than did the district court, however, we address the two central cases that contributed to the ruling in *Walker: Hanna v. Plumer*, 380 U.S. 460 (1965) and *Ragan v. Merchants Transfer Co.*, 337 U.S. 530 (1949). The Court in *Walker* was faced with the precise question presented in *Ragan:* whether Fed. R. Civ. P. 3 was applicable in determining if a state statute

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[2]Fed. R. Civ. P. 3 states in full: "A civil action is commenced by filing a complaint with the court."

[3]Under 1986 Minn. Sess. Law Serv. Ch. 455 at 95 (West), Minn. Stat. Ann. § 145.682 applies "to all actions commenced on or after the effective date" of the statute. The effective date is August 1 at 12:01 am. because no different date was specified. Minn. Stat. Ann. § 645.02.

[4]In view of our holding, we need not pass on this contention.

of limitations was tolled. In *Ragan* the Court held that Fed. R. Civ. P. 3 did not toll a state statute of limitations where the state statute required personal service on a defendant before the action could be deemed commenced. In *Hanna,* however, the Court held that rule 4 of the Federal Rules of Civil Procedure determined the appropriate method of service rather than Massachusetts state law. *Hanna,* 380 U.S. at 474. There has existed much controversy since *Hanna* as to whether the two decisions could be reconciled. Although the *Hanna* Court distinguished *Ragan,* Justice Harlan stated that the two decisions could not be reconciled. *Hanna,* 380 U.S. at 476 (Harlan, J., concurring). It was not until *Walker* that the Supreme Court laid these arguments to rest.

The relevant facts in *Ragan* and *Walker* were similar. In both cases, the plaintiff failed to serve the defendants within the time provided by the relevant state statute of limitations. In both opinions the Court construed the policies expressed in *Erie* as dictating that compliance with Fed. R. Civ. P. 3 does not toll the state statute of limitations. *Walker,* 446 U.S. at 750-51; *Ragan,* 337 U.S. at 532-33. The rule that evolved from those cases is that where there is no direct clash between federal and state procedural law, and the state procedural rule is an integral part of the state scheme, the state law requirements must be met. The Court reasoned that Fed. R. Civ. P. 3 as applied in *Ragan* was not intended to be so broad in scope so as to toll a state statute of limitations. *Walker,* 446 U.S. at 750-51; *Ragan,* 337 U.S. at 533.

While the Court found that the facts in *Ragan* and *Walker* did not present a direct clash with state law, in *Hanna* the Court found a direct, irreconcilable conflict. *Hanna* involved Fed. R. Civ. P. 4(d)(1), which permits service of

process at respondent's home by leaving the summons and complaint with someone of suitable age and discretion. The person served need not be the defendant. *Hanna*, 380 U.S. at 461; Fed. R. Civ. P. 4(d)(1). In *Hanna*, the service of summons was made on the defendant executor's wife pursuant to rule 4. The applicable state law, however, required service of process to be personally delivered to the defendant. While the Court in *Hanna* enforced the federal rule on service of process rather than the Massachusetts rule, *Walker* made clear that *Hanna* did not overrule *Ragan*.

In the present case, the district court held that *Walker* required dismissal because the affidavit of expert review requirement is an integral part of the state's medical malpractice scheme. After analyzing the policies raised in *Erie*, *Ragan*, *Hanna*, and *Walker*, however, we conclude that rule 3 of the Federal Rules of Civil Procedure governs the date from which the Hughes' suit was commenced. Since Minn. Stat. Ann. § 145.682 does not apply to suits commenced prior to August 1, 1986, the requirement of expert review does not apply to the Hughes' suit.

Walker instructs us that "[t]he first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court." *Walker*, 446 U.S. at 749-50. Justice Marshall, writing for the Court in *Walker*, also makes clear that only in cases of direct conflict between state and federal procedural rules does the *Hanna* analysis apply. *Walker*, 446 U.S. at 750 n.9. *Walker* does not require us to read Fed. R. Civ. P. 3 narrowly in order to avoid this conflict; rather, the Court instructs us that the federal rules are to be "given their plain meaning." *Id.* Thus, it is clear that rule 3 is sufficiently broad to control the issue of the date of the commencement

of the action. Furthermore, there is a direct conflict between state and federal law as to the date of commencement.

While an analysis of *Ragan, Hanna,* and *Walker* supports our holding, it is helpful to consider in addition the purpose behind rule 3. The *Walker* Court quoted approvingly from Professors Wright and Miller's treatise on federal practice, which states: "Rule 3 simply provides that an action is commenced by filing the complaint and has as its *primary purpose* the measuring of time periods that begin running from the date of commencement; the rule does not state the filing tolls the statute of limitations." *Walker,* 446 U.S. at 750 n.10 (emphasis added) (quoting from 4 C. Wright and A. Miller, *Federal Practice and Procedure* § 1057, at 191 (1969)).

The Hughes' action does not present a tolling problem. Even so, Justice Marshall's discussion of the policies involved in construing a federal-state procedural rule conflict in *Walker* is helpful. The Court states:

> In contrast to Rule 3, the Oklahoma statute is a statement of a substantive decision by that State that actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations. See *C & C Tile Co.* v. *Independent School District No. 7 of Tulsa County,* 503 P.2d 554, 559 (Okla. 1972). The statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim. A requirement of actual service promotes both of those functions of the statute.

> See generally *ibid; Seitz* v. *Jones,* 370 P.2d 300, 302 (Okla. 1961). See also Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 730-731 (1974). It is these policy aspects which make the service requirement an "integral" part of the statute of limitations both in this case and in *Ragan.* As such, the service rule must be considered part and parcel of the statute of limitations.

Walker, 446 U.S. at 751-52 (footnotes omitted).

The Hughes' suit does not raise the same policy issues as those addressed in *Walker.*

Moreover, we find the *Hanna* rule controls the applicability of rule 3 in this narrow, singular instance because it does not contravene the policy factors behind *Erie.* In *Hanna,* the Court wrote that the outcome-determinative test in *Erie* and *York* had to be read with reference to the twin aims of *Erie:* "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna,* 380 U.S. at 468.

There was no forum shopping in this suit, and our holding will not promote forum shopping in the future. Here, as in *Walker,* there is no evidence that the plaintiffs filed in federal court in order to avoid those service requirements. The plaintiffs could have filed in state court, and, if they were aware of the new legislation, they could have sought an expedited service of process in the state court to assure service of summons before August 1. Furthermore, all suits commenced after August 1 will be governed by the Minnesota statute. Thus, there exists no great policy question governing future cases.

Second, there is no "inequitable administration of law" by our adherence to Fed. R. Civ. P. 3. If plaintiffs are unable to prove sufficient evidence of malpractice, they may face either summary judgment or a directed verdict. The best that might be said, by borrowing from *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), is that the Minnesota statute does not bear "on a State-created right vitally" and affects this diversity litigation only "formally or negligibly." *Guaranty Trust*, 326 U.S. at 110. Furthermore, the *Hanna* Court recognized, 380 U.S. at 467-74, as it did in *Guaranty Trust*, 326 U.S. at 108-11, and *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 555 (1949), that "the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic." *Guaranty Trust*, 326 U.S. at 108. Thus, where a federal rule clashes with a state rule, it is not critical that "it alters the mode of enforcing state-created rights," *Hanna*, 380 U.S. at 473, rather, it is critical that Congress be allowed "to prescribe housekeeping rules for federal courts even though some of these rules will inevitably differ from comparable state rules." *Id.* at 473. In a case of direct conflict, then, the federal rule of civil procedure will prevail over an applicable state rule of procedure.

For the reasons announced, the judgment of the district court is reversed and the cause remanded for further proceeding.

A true copy.
Attest:
CLERK,
U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-5057-MN

Marilyn Hughes, et al.,

Appellants,

vs.

Mayo Clinic, et al.,

Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA

Appellees' petition for rehearing en banc has been considered by the Court and is denied.

Judges Fagg, Bowman and Magill would have granted the petition.

Petition for rehearing by the panel is also denied.

January 28, 1988.

Order Entered at the Direction of the Court:

Robert D. St. Vrain

Clerk, United States Court of Appeals, Eighth Circuit

APPENDIX E

28 U.S.C. § 2072. Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Minn. Stat. § 145.682. Certification of expert review; affidavit

Subdivision 1. Definition. For purposes of this section,

"health care provider" means a physician, surgeon, dentist, or other health care professional or hospital, including all persons or entities providing health care as defined in section 145.61, subdivisions 2 and 4, or a certified health care professional employed by or providing services as an independent contractor in a hospital.

Subd. 2. Requirement. In an action alleging malpractice, error, mistake, or failure to cure, whether based on contract or tort, against a health care provider which includes a cause of action as to which expert testimony is necessary to establish a prima facie case, the plaintiff must: (1) unless otherwise provided in subdivision 3, paragraph (b), serve upon defendant with the summons and complaint an affidavit as provided in subdivision 3; and (2) serve upon defendant within 180 days after commencement of the suit an affidavit as provided by subdivision 4.

Subd. 3. Affidavit of expert review. The affidavit required by subdivision 2, clause (1), must be by the plaintiff's attorney and state that:

(a) the facts of the case have been reviewed by the plaintiff's attorney with an expert whose qualifications provide a reasonable expectation that the expert's opinions could be admissible at trial and that, in the opinion of this expert, one or more defendants deviated from the applicable standard of care and by the action caused injury to the plaintiff; or

(b) the expert review required by paragraph (a) could not reasonably be obtained before the action was commenced because of the applicable statute of limitations. If an affidavit is executed pursuant to this paragraph, the affidavit in paragraph (a) must be served on defendant or the

defendant's counsel within 90 days after service of the summons and complaint.

Subd. 4. Identification of experts to be called. The affidavit required by subdivision 2, clause (2), must be by the plaintiff's attorney and state the identity of each person whom plaintiff expects to call as an expert witness at trial to testify with respect to the issues of malpractice or causation, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. Answers to interrogatories that state the information required by this subdivision satisfy the requirements of this subdivision if they are signed by the plaintiff's attorney and served upon the defendant within 180 days after commencement of the suit against the defendant.

The parties or the court for good cause shown, may by agreement, provide for extensions of the time limits specified in subdivision 2, 3, or this subdivision. Nothing in this subdivision may be construed to prevent either party from calling additional expert witnesses or substituting other expert witnesses.

Subd. 5. Responsibilities of plaintiff as attorney. If the plaintiff is acting pro se, the plaintiff shall sign the affidavit or answers to interrogatories referred to in this section and is bound by those provisions as if represented by an attorney.

Subd. 6. Penalty for noncompliance. Failure to comply with subdivision 2, clause (1), within 60 days after demand for the affidavit results, upon motion, in mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a prima facie case.

Failure to comply with subdivision 2, clause (2), and sub-

division 4 results, upon motion, in mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a prima facie case.

Subd. 7. Consequences of signing affidavit. The signature of the plaintiff or the plaintiff's attorney constitutes a certification that the person has read the affidavit or answers to interrogatories, and that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry, it is true, accurate, and made in good faith. A certification made in violation of this subdivision subjects the attorney or plaintiff responsible for such conduct to reasonable attorney's fees, costs, and disbursements.

Minn. Stat. § 645.02 Effective date and time of laws

Each act, except one making appropriations, enacted finally at any session of the legislature takes effect on August 1 next following its final enactment, unless a different date is specified in the act. A special law required to be approved by the local government unit affected before it goes into effect becomes effective as to the approving unit the day following the day on which the certificate of approval prescribed by section 645.021 is filed with the secretary of state, unless a later date is specified in the act. When approval of such a special law is required by two or more local government units before it may become effective, the day after the day when the last of the required certificates is filed is the effective date, unless a later date is specified in the act.

An appropriation act or an act having appropriation items enacted finally at any session of the legislature takes effect at the beginning of the first day of July next following its final enactment, unless a different date is specified it the act.

Each act takes effect at 12:01 a.m. on the day it becomes effective, unless a different time is specified in the act.

1986 Minn. Laws, Ch. 455, Sec. 95. EFFECTIVE DATES

Section 2, 63 to 77, and 90 are effective July 1, 1986, and apply to claims arising from incidents that occur on or after that date.

Sections 60, 79, 82, and 83 apply to all actions commenced on or after the effective date of those sections. Sections 80, 84, 85, 86, 88, and 89 apply to actions pending on or commenced on or after the effective date of those sections.

Sections 3 to 59, 61, 62, 78, and 94 are effective the day following final enactment. Section 79 is effective January 1, 1987.

Approved March 25, 1986.

Fed. R. Civ. P. 3. Commencement of Action

A civil action is commenced by filing a complaint with the court.

Minn. R. Civ. P. 3.01 Commencement of the Action

A civil action is commenced against each defendant:

(a) when the summons is served upon that defendant, or

(b) at the date of acknowledgment of service if service is made by mail, or

(c) when the summons is delivered to the sheriff in the county where the defendant resides for service; but such delivery shall be ineffectual unless within 60 days thereafter the summons be actually served on him or the first publication thereof be made.